TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 257.

MORRIS KEIM, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 13, 1903.

(16,848.)

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INDEX.

	Original.	Print.
Petition and amended petitions	1	1
Traverse of second amended petition	6	4
Findings of fact and conclusion of law	7	4
Opinion of the court	9	7
Dissenting opinion	12	10
Order as to amendment of petition and suspending entry of judgment	14	13
Amended petition filed by leave of court	15	13
Judgment of the court	18	16
Application of claimant for and allowance of appeal	19	16
Clerk's certificate	20	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 6, 1898.

1 In the Court of Court of Claims.

MORRIS KEIM
vs.
THE UNITED STATES. } No. 19342.

I.—*Petition.*

On the 25th day of July, 1895, the claimant filed his original petition. By leave of court he, on the 7th day of October, 1895, filed an amended petition, and on the 27th day of December, 1895, he filed a second amended petition, which is as follows:

Second Amended Petition.

Filed December 27, 1895.

Your petitioner, Morris Keim, for his second amended petition herein, respectfully represents:

1. That he is a citizen of the United States, residing in Farmwell, Loudoun county, State of Virginia, has always yielded true allegiance to the Government of the United States of America, and is the owner of the claims hereinafter sued on, never having sold or assigned the same, or any part thereof, to any person or persons.

2. That on the 26th day of August, 1862, he enlisted and was mustered into the military service of the United States, in Company I, 154 New York volunteer infantry, serving therein for the suppression of the rebellion, up to the 25th day of January, 1865, on which last-named date he was duly transferred to the 154th company of the second bat-al*l*ion, veteran reserve corps, and was honor-
2 ably discharged therefrom on the 17th day of April, 1865, at Nashville, Tenn., by order of Major General George H. Thomas, "by reason of" the regimental surgeon's certificate of "disability from *inguinal hernia*, contracted from excessive labor while under military orders at camp of detachment, Chattanooga, Tenn., in the summer of 1864."

3. That on the 7th day of May, 1888, upon examination by the Civil Service Commission, he was duly appointed to a clerkship in the Post-office Department, in class —, in the division known as the money-order office, at an annual salary of $900.00, which position he held up to February 4, 1889, when he was at his own request, duly transferred to the Treasury Department, and was assigned to the branch then known as the Sixth Auditor's office, at the salary of $900.00 per annum; that on the 31st day of October, 1890, he was, upon examination, duly promoted to class 1, in said Sixth Auditor's office, which clerkship he held up to March 16, 1893; that on the said 16th day of March, 1893, he was, at his own request, on the certification of the Civil Service Commission, transferred to the Department of the Interior, and assigned to a clerkship in class 1 in the Pension Bureau, at the salary of $1,200 per year, which he con-

tinued to hold until March, 1894, and at this salary continued in said bureau as such clerk, but was reduced, to the salary of $1,000 per annum, on or about the 1st day of March, 1894, at which last-named salary he continued to serve as such clerk up to July 31, 1894, when he was formally discharged from said service, without any fault of his own, and without just cause, and has not since said last-named date been permitted to discharge the duties of said clerkship, although he has at all times, since said last-named date, stood ready and willing to
3 discharge the duties thereof; that the Secretary of the Interior upon the recommendation of the Commissioner of Pensions, which recommendation was based upon false and fraudulent representations by his subordinates, as to the efficiency record of your petitioner, directed his discharge from said office as aforesaid; that, at the time of his said discharge, the requirements of the public service in said Pension Bureau demanded the retention of your petitioner, and his said services are now required therein; that the Secretary of the Interior upon the recommendation of the Commissioner of Pensions, did retain, at the time of the discharge of your petitioner, as aforesaid, and now retains one Charles E. Bookwalter, and other clerks of the same division, who have received since his said discharge, and are now receiving the same salary, to wit, $1,000 per annum (except that said Bookwalter receives $1,200 per annum) who have not been honorably discharged from the military or naval service of the United States, and who were not found, at the time of petitioner's said discharge, to possess better business capacity for the proper discharge of the duties of their said offices, than the required qualifications for said duties possessed by your petitioner at the time of his said discharge; that on or about the day your petitioner received notice of his said discharge, additional clerks were appointed to duties in the same division in which petitioner served in said bureau, who were not honorably discharged from the military or naval service of the United States, and who never rendered any military or naval service whatever.

4. Your petitioner further says, that he was efficient in the discharge of his duties as such clerk, and was able to, and did, discharge with efficiency, the said duties; that he was faithful in his attendance upon his said duties, sober and industrious
4 therein, and fell short of nothing with regard thereto; that the efficiency record ordered to be, and which was, kept in said Pension Bureau, will show that your petitioner possessed the business capacity necessary for the proper discharge of the duties of his said office, both prior to, and at the time of, his said discharge; and that he did, at the time of his said discharge and does now, possess the necessary business capacity for the proper discharge of the duties of his said office.

5. For first cause of action herein, your petitioner alleges, that, during the time he was such clerk in the Pension Bureau, he faithfully discharged all the duties required of him in the month of July, 1894; that he was not absent from said bureau in and during

the calendar year 1894, more than thirty days' "annual leave," and thirty days' "sick leave," prior to his said discharge as aforesaid; that he was and is entitled to an annual salary of $1,000; and, during said month of July, 1894, was and is entitled to the sum of $84.20, payable semi-monthly, according to the practice of the Pension Office; that instead of said sum of $84.20, on account of salary, as aforesaid, he received the sum of $48.90, leaving due him from the defendant, and wholly unpaid, $35.30, which sum has been refused him, although payment thereof has often been requested.

6. For second cause of action herein, your petitioner alleges, that there is justly due him from the United States, the salary of his said clerkship, from the 31st day of July, 1894, to this date, to wit: $1,000 per annum, or a total sum due and unpaid, as such salary, of $1,375.00 under the act entitled "An act to regulate and improve the civil service of the United States," approved January 16, 1883, and acts amendatory thereof, and also under section 1754, R. S. U. S., and the statutes supplemental thereto, found at page 120, Supplement R. S. U. S., volume 1.

7. And your petitioner says, that there remains due and unpaid to him, from the defendant, on account of both said causes of action, the sum of fourteen hundred, ten dollars and thirty cents.

Wherefore, your petitioner demands judgment against the defendant in the sum of $1,410.30 and all proper relief in the premises.

MORRIS KEIM, *Petitioner.*

DISTRICT OF COLUMBIA, *City of Washington,* } ss:

Morris Keim, being duly sworn, upon his said oath says: That he is the petitioner in the above-entitled cause; that he has read the foregoing petition and understands the same; that the matters therein stated on his personal knowledge are true, and that those matters therein stated upon information and belief, he believes to be true.

MORRIS KEIM.

Subscribed and sworn to before me this 27th day of December, 1895.

GEO. E. TERRY,
Notary Public, D. C.

[SEAL.]

LUTHER R. SMITH,
Claimant's Attorney (Warder Building).

CHANEY & GARRISON,
Of Counsel, 1320 *F Street.*

On January 2, 1896, the defendants filed their demurrer to this petition; which was overruled by the court March 2, 1896, and on March 9, 1896, the defendants filed a general traverse to said petition.

6 II.—*Traverse to Second Amended Petition. Filed March* 9, 1896.

In the Court of Claims of the United States.

MORRIS KEIM
vs.
THE UNITED STATES. } No. 19342.

And now comes the Attorney General, on behalf of the United States, and answering the 2nd amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and ha- not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

J. E. DODGE,
Assistant Attorney General.

7 III.—*Findings of Fact and Conclusion of Law. Filed January* 3, 1898.

This case having been heard by the Court of Claims, the court, upon the evidence, find the facts to be as follows:

I.

Morris Keim, the plaintiff, is a citizen of the United States.

II.

August 26, 1862, he enlisted and was mustered into the military service of the United States, in Company I, One hundred and fifty-fourth New York volunteer infantry, serving therein during the late war to January 25, 1865, when he was duly transferred to the One hundred and fifty-fourth company of the second battalion veteran reserve corps, and was honorably discharged therefrom April 17, 1865, at Nashville, Tenn., by order of Maj. Gen. George H. Thomas, "by reason of disability from inguinal hernia, contracted from excessive labor while under military orders at camp of detachment, Chattanooga, Tenn., in the summer of 1864."

III.

May 7, 1888, after examination by the Civil Service Commission, he was appointed to a clerkship in the Post-office Department, in the division known as the money-order office, with salary at the rate of $900, which position he held until February 4, 1889, when he was, at his own request, transferred to the Treasury Department

and assigned to the branch then known as the Sixth Auditor's office, with salary at the rate of $900 per annum; October 31, 1890, he was, upon examination, promoted to class 1 in said Sixth Auditor's office, which clerkship he held until March 16, 1893; he was then, at his own request and on the certificate of the Civil Service Commission, transferred to the Department of the Interior and assigned to a clerkship in class 1 in the Pension Bureau, with salary at the rate of $1,200 per year, which he held until March, 1894. March 1, 1894, his salary was reduced to $1,000 per annum, at which salary he continued to serve to July 31, 1894, when he was discharged, and has not since said last-named date been permitted to discharge the duties of said clerkship, although he has stood ready and willing to discharge the duties thereof.

IV.

At the time of his said discharge the requirements of the public service in said Pension Bureau demanded the retention of a clerk in plaintiff's place; the Secretary of the Interior, upon the
8 recommendation of the Commissioner of Pensions, retained at the time of plaintiff's discharge, and now retains, other clerks of the same division who have received since plaintiff's discharge, and are now receiving, the same salary, to wit, $1,000 per annum (one receiving $1,200 per annum), who have not been honorably discharged from the military or naval service of the United States, and who are not shown to this court, except as in these findings set forth, to have possessed at the time of plaintiff's discharge better or inferior business capacity for the proper discharge of the duties of their said offices than the qualifications for the said duties possessed by plaintiff at that time. On or about the day plaintiff received notice of his discharge additional clerks were appointed to duties in the same division in which he served in said bureau who never rendered any military or naval service. It does not appear that any of these clerks were regarded or reported as inefficient by any superior officer; nor does it appear that those so retained or those thereafter appointed possessed better, or equal, or inferior qualifications for the discharge of the duties of their respective offices than those possessed therefor by the plaintiff.

V.

The order of discharge bore this indorsement signed by the Commissioner of Pensions:

The discharge of Mr. Morris Keim was recommended because of his rating as inefficient. No other charges are made against him.

WM. LOCHREN,
Commissioner.

July 14, 1894.

VI.

There is no evidence that plaintiff made any effort to secure other employment, or that he has, or has not, been employed at any kind

of work from and after his said discharge July, 1894. Nor is there evidence as to the difference in amount between his salary while in the Government service and any moneys he might have earned or could have reasonably earned or has earned in other ways since his said discharge.

Additional Finding.

Plaintiff requests the court to make the findings of fact hereto annexed. Except as hereinbefore set forth, the court decline to accede to these requests, deeming said requested findings, if true, to be irrelevant to the issue presented as set forth in the opinion of the court:

1. That Morris Keim, the petitioner, is a citizen of the United States, residing at Farmwell, Loudoun county, Va, and has always yielded true allegiance to the Government of the United States.

2. That on the 26th day of August, 1862, he enlisted and was mustered into the military service of the United States, in Company I, One hundred and fifty-fourth New York volunteer infantry, serving therein, for the suppression of the rebellion, up to the 25th day of January, 1865, on which said last-named date he was duly transferred to the One hundred and fifty-fourth company of the second battalion, veteran reserve corps, and was honorably discharged therefrom April 17, 1865, at Nashville, Tenn., by order of Maj. Gen. George H. Thomas, "by reason of disability from inguinal hernia, contracted from excessive labor while under military orders at camp of detachment, Chattanooga, Tenn., in the summer of 1864."

3. That on the 7th day of May, 1888, upon examination by the Civil Service Commission, he was duly appointed to a clerkship in the Post-office Department, in class —, in the division known
9 as the money-order office, at an annual salary of $900, which position he held up to February 4, 1889, when he was at his own request duly transferred to the Treasury Department, and was assigned to the branch then known as the Sixth Auditor's office, at the salary of $900 per annum; that on the 31st day of October, 1890, he was, upon examination, duly promoted to class 1, in said Sixth Auditor's office, which clerkship he held up to March 16, 1893; that on the said 6th day of March, 1893, he was, at his own request, on the certificate of the Civil Service Commission, transferred to the Department of the Interior, and assigned to a clerkship in class 1 in the Pension Bureau at the salary of $1,200 per year, which he continued to hold until March, 1894, and at this salary continued in said bureau as such clerk, but was reduced to the salary of $1,000 per annum on or about the 1st day of March, 1894, at which last-named salary he continued to serve as such clerk up to July 31, 1894, when he was formally discharged from said service, without any fault of his own, and without just cause, and has not since said last-named date been permitted to discharge the duties of said clerkship, although he has at all times, since said last-named date, stood ready and willing to discharge the duties thereof.

4. That at the time of his said discharge the requirements of the public service in said Pension Bureau demanded the retention of your petitioner, and his said services are now required therein; that the Secretary of the Interior, upon the recommendation of the Commissioner of Pensions, did retain, at the time of the discharge of your petitioner, as aforesaid, and now retains one Charles E. Bookwalter, and other clerks of the same division who have received since his said discharge, and are now receiving the same salary, to wit, $1,000 per annum (except that said Bookwalter receives $1,200 per annum), who have not been honorably discharged from the military or naval service of the United States, and who were not found, at the time of petitioner's said discharge, to possess better business capacity for the proper discharge of the duties of their said offices than the required qualifications for the said duties possessed by your petitioner at the time of his said discharge; that on or about the day your petitioner received notice of his discharge additional clerks were appointed to duties in the same division in which your petitioner served in said bureau, who were not honorably discharged from the military or naval service of the United States, and who never rendered any military or naval service whatever.

5. That petitioner was, at the time of his so-called discharge, an efficient clerk, and discharged his duties faithfully and efficiently, and at the time of his said discharge he possessed and now possesses the necessary business capacity for the proper discharge of the duties of said clerkship.

6. That there is due petitioner for and on account of services rendered by him in the month of July, 1894, $35 30, if it shall be found that same was improperly and illegally withheld from him.

7. That there is due the petitioner upon the "second amended petition," if he shall be deemed illegally deprived of his office, on account of annual salary at the rate of $1,000 per annum, since July 31, 1894, $1,375.

Conclusion of Law.

Upon the foregoing findings of fact the petition will be dismissed.

IV. *Opinion of the Court.*

DAVIS, J., delivered the opinion of the court:

The plaintiff served in the army during the late war and was honorably discharged. Later, and after a civil-service examination, he was made a clerk in an executive department; then (at his request) he was transferred to another department; there he secured promotion; then he was (following his wish) transferred to the Department of the Interior and assigned to duty as a clerk in the Pension Bureau, where our interest in him begins; later he was reduced in rank, and still later he was discharged.

The discharge he alleges to have been without fault or deficiency on his part.

The following order was signed by the Commissioner of Pensions:

The discharge of Mr. Morris Keim was recommended because of his rating as inefficient. No other charges are made against him.

The substantial point in the case concerns the power of the court to examine into the course of an officer of a principal executive department of the United States in advancing or degrading or dismissing a subordinate who has entered the executive service through the recommendation of the Civil Service Commission and who is also an honorably discharged soldier.

Defendants assert that the plaintiff was not sufficiently competent. This is denied, and an effort is made to show that he was competent; that he was dismissed for other reasons than lack of sufficient ability, and that (in any event) he was not given the preference to which on (otherwise) even terms the former soldier is entitled.

The statutes provide:

Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices. (Sec. 1754, R. S.)

That whenever in the judgment of the head of any department the duties assigned to any clerk of one class can be as well performed by a clerk of a lower class, or by a female clerk, it shall be lawful for him to diminish the number of the clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service: *Provided*, That in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors. (Sec. 3, Supp. to R. S., vol. 1, p. 120; act 15th August, 1876, 19 Stat. L., 169, sec. 3.)

The plaintiff relies upon the act of August 15, 1876, above quoted, contends that the proviso is mandatory and the acts done under it may be the subject of judicial determination. The first line of the section expressly states that the comparative performance of certain clerks shall be determined by "the judgment of the head of any department." In the proviso a comparison is also directed between persons who may be equally qualified to perform the duties which may be assigned to them; that is, between clerks who have been in the military or naval service and those who have not been in either service. To entitle the former to retention in service they must be equally qualified. The statute does not say whether this shall be determined by the records of an executive department or by the courts. By whom shall it be determined? The enacting clause of the section (act of 1876) answers the inquiry by saying that it shall be determined by the "judgment" of the head of the department. It is not correct to say that one rule is prescribed by the enacting clause and a different rule by the proviso. The judgment of the

head of the department is as applicable in the one class of cases as in the other; and the qualifications of the clerk to be appointed in the one class or of the clerk to be retained in the other are necessarily matters committed to the judgment of the head of the department within the intent and meaning of the statute.

The first question we have to consider is as to our power. May a court enter an executive department, examine the acts of the principal officer, inquire into his exercise of discretion, put him, in effect, upon the witness stand, and investigate the reasons which influenced the exercise of this discretion?

11 The plaintiff seeks to show that other clerks were less efficient than he, and that these clerks were retained while he was discharged; but who is to decide as to this efficiency, the superior administrative officer, responsible for the efficient conduct of his office, and dependent upon this for his reputation and tenure; the officer presumably competent and upright and always subject to still superior executive control and legislative supervision; is he to decide this, or are the courts?

The civil-service laws provide for entrance into Government employ; they direct that (other things being equal) the soldier shall have preference, but some one in authority must in each instance decide whether the former soldier has placed himself in such a position of equality with his colleagues as to be entitled to the statutory advantage.

In our opinion there is but one question presented in this record, to wit: Is a court to decide whether a clerk has so performed his work as to bring himself within the protected class, or have that clerk's executive superiors the power and the duty to make that decision, and to make it finally?

The plaintiff had a right "to be preferred for appointment" if found to possess the necessary business capacity. It might be urged that as he was in fact appointed, power under this statute was exhausted. We need not discuss that point; the case is too important to pause at a slight issue. The purport and intent of the law is evident and admitted that the soldier, under equal conditions, shall be favored. But who is to decide as to this equality? Who is to say whether any one individual is equally efficient with his rival? Is this power lodged in the superior executive officer, or are the courts to investigate the record not only of clerks discharged or clerks reduced in pay, but also to compare their records with those of their colleagues or rivals, and then to decide judicially that the superior executive officer has erred and has discharged or promoted the wrong man?

As a broad principle, the power to appoint implies the power to remove (People *ex rel.* McCullough *v.* Cram., 36 N. Y. Sup. Ct., 1117). The Supreme Court of the United States (*Ex parte* Hennen, 13 Peters, 230; Parsons *v.* U. S., 30 C. Cls., 222, and 167 U. S., 324) have held:

There can be no doubt that these clerks hold their office at the will and discretion of the head of the department. It would be a most extraordinary construction of the law that all these officers

were to be held during life, which must inevitably follow, unless the incumbent was removable at the discretion of the head of the department.

The power to appoint has been limited by the civil-service laws; the power to remove, however, remains unimpaired in the executive except for this, that (other things being equal) the removing power must retain the man who has served during the war as a soldier; so again we reach the point of this case which (although much else has been said) simply is:—who is to decide?

If the courts can examine these questions, if every discharged clerk can by an appeal to the judiciary possibly override his chief and be reinstated in an office for which his chief deems him incompetent, the discipline of the departments is seriously impaired. In *Chisholm's case* (27 C. C., p. 98), this court held "upon such questions as these the executive officers can alone decide; they
12 are questions of discretion which in their nature belong to those having the responsibility." The officers of the Government are carefully selected; the head of the principal executive departments and of the important bureaus are trained men of broad experience and national reputation; to spare them certain pressure and responsibility and in an effort to improve the subordinate civil service the statutes now under consideration were passed; but these statutes relate only to selection for appointment, and do not touch upon the power of removal except that (other things being equal) the soldier shall be retained.

The superior executive officer decides as to the removal. The law controlling him is the unwritten law of fairness, justice, kindness, and honesty, and also the written law that (other things being equal) the soldier shall be preferred. The supervision of this purely executive power is not intrusted to the judicial branch of the Government of the United States.

Petition dismissed.

Weldon, J., concurs in the judgment *pro forma* in order that the case may be decided by the Supreme Court.

(Howry, J., took no part in the decision of this case.)

Dissenting Opinion.

PEELLE, J., dissents for the following reasons:

The facts found by the court (2 and 3) clearly bring the claimant within the class of persons preferred for appointment under Revised Statutes, section 1754, about which there is no controversy; while finding 4 is apparently sufficient to bring him within the class of persons preferred for retention under the act of 1876. But if not the facts requested by the claimant and refused to be found by the court, though set out *in extenso*, because not deemed relevant to the issue, clearly do.

At the time of the claimant's appointment and during his service as such clerk there existed the following statutes:

Revised Statutes:

SEC. 1754. Persons honorably discharged from the military or

naval service by reason of disability resulting from wounds or sickness incurred in the line of duty shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices.

Section 3, act of August 15, 1876 (Supp. Rev. Stat., vol. 1, p. 120):

SEC. 3. That whenever, in the judgment of the head of any department, the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class, or by a female clerk, it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service:

Provided, That in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors.

Section 7, act of January 16, 1883 (22 Stat. L., 403, Supp. Rev. Stat., vol. 1, p. 395):

SEC. 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith.

But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes.

The claimant's right depends upon the proper construction to be given to the proviso to section 3, act of August 15, 1876 (*supra*), in connection with section 1754, preserved by the civil-service act.

The theory of the court's opinion is that even if the facts which it refuses to find, though set out *in extenso*, are true, still the result must be the same, for the reason that "whether a clerk has
13 so performed his work as to bring himself within the protected class," for retention on the reduction of force, is a question within the supervision of "purely executive power," and not therefore "entrusted to the judicial branch of the Government."

In other words, that the interpretation and enforcement of the statute "shall be determined by the 'judgment' of the head of the department," and is not therefore within the jurisdiction of the courts.

By the act of March 3, 1887, section 1 (24 Stat. L., 505, 1 Supp. Rev. Stat., p. 559), it is provided "that the Court of Claims shall have jurisdiction to hear and determine the following matters:

All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or im-

plied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable.

If, therefore, the statute of 1876 is one upon which a claim can be founded, this court has jurisdiction under the act of 1887 "to hear and determine" it.

If the claimant acquired any right under the preference statutes quoted of which he was illegally deprived, to his damage, then his claim is well founded, and the court has jurisdiction to hear and determine it.

Under the act of 1876 it is for the head of a department to determine whether "the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class or by a female clerk," and if, in his judgment, it can be done, "it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of clerks of the lower grade within the limits of the total appropriation for such clerical service." But having gone that far, the Congress saw that the purpose of the preference given in appointments by section 1754 might be taken away, and so they added the proviso, excepting from the operation of the statute such preferred class for retention, thereby limiting the power of removal in respect of such preferred class by providing "that the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States." Not that he may or may not in his judgment retain such, but that he "shall retain."

It was not intended by the proviso to establish a new rule for the ascertainment of the business capacity or qualifications necessary to entitle such preferred class to retention or to submit to the judgment of the head of a department the question as to the qualifications of those preferred for appointment under section 1754. The purpose of that section should not be defeated in the execution of the act of 1876, but rather effectuated, and in case of conflict the former should prevail, as it was in express terms preserved by the civil-service act; besides, the legislation was intended for the benefit of such preferred class, and good faith requires that the preference given by statute to those so honorably discharged should not be taken away for slight or transient causes, nor should technicalities intervene to defeat the purpose of Congress in reference thereto.

The claimant having been honorably discharged from the military service of the United States and having been appointed after a civil-service examination pursuant to law, the presumption is that he possessed the business capacity necessary for the proper discharge of the duties of the service into which he entered, and he was therefore entitled to retention in the reduction of force; but aside from such presumption the findings set out, and refused to be found because deemed irrelevant, clearly establish the claimant's efficiency as a clerk, and that being so, he must have been "equally qualified" as matter of fact with those so retained. Such being his

status at the time of his discharge, he was entitled, under the act of 1876, to be retained.

I am dealing with a statute which in express terms prefers for retention a specified class, and if that statute is to be enforced, as manifestly intended by Congress it should be, then the discharge of the claimant at the time and under the circumstances of this case was in violation thereof, and that being so, he was deprived of a right thereunder, *i. e.*, the right to be retained in his position and to continue to enjoy the salary provided therefor by law.

The claimant having brought himself within the provisions of the statute as one entitled to retention, and having been deprived of his office or employment to his damage, *i. e.*, the loss of the salary provided therefor by law, his claim is one which this court may "hear and determine," under the act of 1887 (*supra*), as a claim arising under a statute.

14 V.—*Order as to Amendment of Petition and Suspending Entry of Judgment. Filed January* 3, 1898.

It is ordered that leave be granted the claimant (should he so elect) to amend his petition within two weeks by increasing the amount claimed to what would be now due were the decision in his favor, and that the entry of judgment to be made herein dismissing the petition be suspended pending the time granted for said amendment.

BY THE COURT.

15 In the Court of Claims of the United States, Term 1897–'98.

MORRIS KEIM
vs.
THE UNITED STATES. } No. 19342.

VI.—*Amended Petition. Filed by Leave of Court January* 8, 1898.

Your petitioner, Morris Keim, for amended petition herein respectfully represents:

1. That he is a citizen of the United States, resident in Farmwell, Loudoun county, State of Virginia, living temporarily at 812 Maryland Ave. N. E., Washington, D. C.; has always yielded true allegiance to the Government of the United States of America, and is the owner of the claims hereinafter sued on, never having sold or assigned the same or any part thereof to any person or persons.

2. That on the 26th day of August, 1862, he enlisted and was mustered into the military service of the United States, in Company I, 154 New York volunteer infantry, serving therein for the suppression of the rebellion up to the 25th day of January, 1865, on which last named date he was duly transferred to the 154th company of the second battalion, veteran reserve corps, and was honorably discharged therefrom on the 17th day of April, 1865, at Nashville, Tenn., by order of Major General George H. Thomas,

"by reason of" the regimental surgeon's certificate of "disability from inguinal hernia, contracted from excessive labor while under military orders, at camp of detachment, Chattanooga, Tenn., in the summer of 1864."

3. That on the 7th day of May, 1888, upon examination by the Civil Service Commission, he was duly appointed to a clerkship in the Post-office Department, in class —, in the division known as the money-order office, at an annual salary of $900.00; which position he held up to February 4, 1889, when he was at his own request duly transferred to the Treasury Department, and was assigned to the branch then known as the Sixth Auditor's office, at the salary of $900.00 per annum; that on the 31st day of October, 1890, he was, upon examination, duly promoted to class 1 in said Sixth Auditor's office, which clerkship he held up to March 16, 1893; that on the said 16th day of March, 1893, he was, at his own request, on the certification of the Civil Service Commission, transferred to the Department of the Interior and assigned to a clerkship in class 1 in the Pension Bureau, at the salary of $1,200 per year, which he continued to hold until March, 1894, and at this salary continued in said bureau as such clerk, but was reduced to the salary of $1,000 per annum on or about the 1st day of March, 1894, at which last-named salary he continued to serve as such clerk up to July 31, 1894, when he was formally discharged from said service, without any fault of his own and without just cause, and has not since said last-named date been permitted to discharge the duties of said clerkship, although he has at all times since said last-named date stood ready and willing to discharge the duties thereof;

16 that the Secretary of the Interior, upon the recommendation of the Commissioner of Pensions, which recommendation was based upon false and fraudulent representations by his subordinates as to the efficiency record of your petitioner, directed his discharge from said office, as aforesaid; that at the time of his said discharge the requirements of the public service in said Pension Bureau demanded the retention of your petitioner, and his said services are now required therein; that the Secretary of the Interior, upon the recommendation of the Commissioner of Pensions, did retain at the time of the discharge of your petitioner, as aforesaid, and now retains one Charles E. Bookwalter and other clerks of the same division, who have received since his said discharge and are now receiving the same salary, to wit, $1,000 per annum (except that said Bookwalter receives $1,200 per annum), who have not been honorably discharged from the military or naval service of the United States, and who were not found at the time of petitioner's said discharge to possess better business capacity for the proper discharge of the duties of their said offices than the required qualifications for said duties possessed by your petitioner at the time of his said discharge; that on or about the day your petitioner received notice of his said discharge additional clerks were appointed to duties in the same division in which petitioner served in said bureau, who were not honorably discharged from the military or naval service

of the United States and who never rendered any military or naval service whatever.

4. Your petitioner further says that he was efficient in the discharge of his duties as such clerk, and was able to and did discharge with efficiency the said duties; that he was faithful in his attendance upon his said duties, sober and industrious therein, and fell short of nothing with regard thereto; that the efficiency record ordered to be and which was kept in said Pension Bureau will show that your petitioner possessed the business capacity necessary for the proper discharge of the duties of his said office, both prior to and at the time of his discharge, and that he did at the time of his said discharge and does now possess the necessary business capacity for the proper discharge of the duties of his said office.

5. For first cause of action herein your petitioner alleges that during the time he was such clerk in the Pension Bureau he faithfully discharged all the duties required of him in the month of July, 1894; that he was not absent from said bureau in and during the calendar year 1894 more than thirty days' "annual leave" and thirty days's "sick leave" prior to his said discharge, as aforesaid; that he was and is entitled to an annual salary of $1,000, and during said month of July, 1894, was and is entitled to the sum of $84.20, payable semi-monthly, according to the practice of the Pension Office; that instead of said sum of $84.20 on account of salary, as aforesaid, he received the sum of $48.90, leaving due him from the defendant and wholly unpaid $35.30, which sum has been refused him, although payment thereof has often been requested.

6. For second cause of action herein your petitioner alleges that there is justly due him from the United States the salary of his said clerkship from the 31st day of July, 1894, to this date, to wit, $1,000 per annum, or a total sum due and unpaid, as such salary, of $3,417.00 under the act entitled "An act to regulate and improve the civil service of the United States," approved January 16,
17 1883, and acts amendatory thereof, and also under section 1754, R. S. U. S., and the statutes supplemental thereto, found at page 120, Supplement R. S. U. S., volume 1.

7. And your petitioner says that there remains due and unpaid to him from the defendant on account of both said causes of action the sum of three thousand four hundred fifty-two dollars and thirty cents.

Wherefore your petitioner demands judgment against the defendant in the sum of $3,452.30 and all proper relief in the premises.

MORRIS KEIM, *Petitioner.*

DISTRICT OF COLUMBIA, *City of Washington,* } *ss:*

Morris Keim, being duly sworn, upon his oath says that he is the petitioner in the above-entitled cause; that he has read the foregoing petition and understands the same; that the matters therein stated upon his personal knowledge are true, and that those matters therein stated upon information and belief he believes to be true.

MORRIS KEIM.

Subscribed and sworn to before me this 7th day of January, 1898.

DIRRELLE CHANEY,
Commissioner.

CHANEY & GARRISON,
Claimant's Attorneys.

18 VII.—*Judgment of the Court.*

MORRIS KEIM
vs.
THE UNITED STATES. } No. 19342.

At a Court of Claims held in the city of Washington on the 21st day of March, A. D. 1898, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the defendants, and do order, adjudge, and decree that the petition of the claimant, Morris Keim, be dismissed.

BY THE COURT.

19 VIII.—*Application of Claimant for and Allowance of Appeal.*

Comes the claimant, by his attorney herein, and petitions the court for an appeal to the Supreme Court of the United States from the findings and judgment of this court rendered in the above entitled cause March 21, 1898, and says:

1. That the Court of Claims erred in not granting the claimant's findings set out in finding 6 of the court's findings and in not finding that the claimant was equally qualified for the discharge of his duties with other clerks in the same bureau who had not been honorably discharged from the military or naval service of the United States.

2. That the court erred as a conclusion of law in dismissing the claimant's petition and in not giving claimant judgment for $3,452.30, as in his said petition claimed.

CHANEY AND GARRISON,
Att'ys for Claimant.

Filed March 21, 1898.

Ordered that the appeal be allowed as prayed for.

BY THE COURT.

March 21, 1898.

20 In the Court of Claims.

MORRIS KEIM
vs.
THE UNITED STATES. } No. 19342.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court

and the conclusion of law thereon, of the opinion of the court and the dissenting opinion, of the judgment of the court dismissing the petition, of the application of the claimant for and the allowance of an appeal to the Supreme Court of the United States.

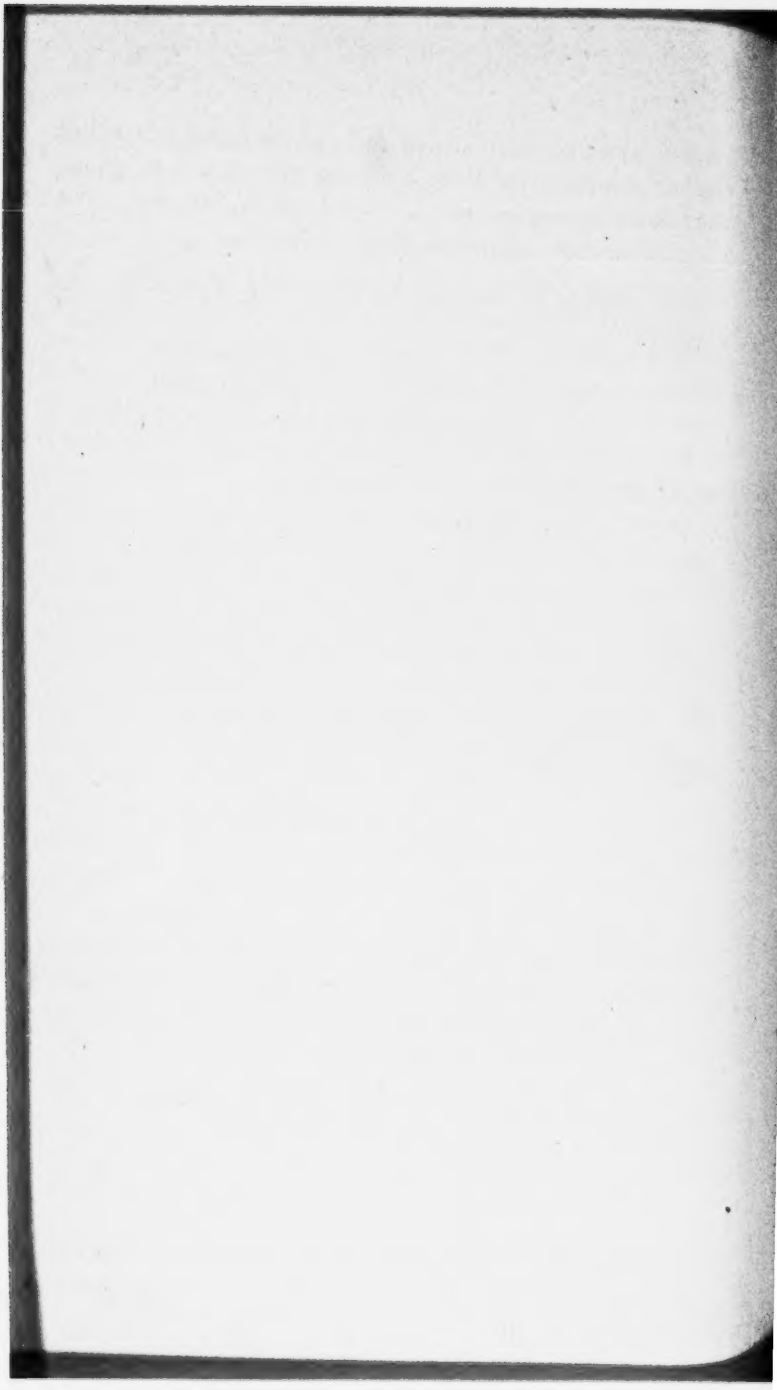
Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 28th day of March, 1898.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

[Endorsed:] No. —. In the Supreme Court. Morris Keim *vs.* The United States. Appealed from the Court of Claims. Chaney & Garrison, appellant's attorneys.

Endorsed on cover: Case No. 16,848. Court of Claims. Term No., 278. Morris Keim, appellant, *vs.* The United States. Filed April 13th, 1898.



Brief of Chaney for Appellant

Filed January 7, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

MORRIS KEIM

vs. } No. 278.

THE UNITED STATES.

APPELLANT'S STATEMENT AND BRIEF OF ARGUMENT.

JOHN C. CHANEY,
Appellant's Attorney.

December 30, 1898.

JUDD, LAW PRINTER, 416 5 STREET, N. W., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

MORRIS KEIM, *Appellant,*	
vs.	No. 278.
THE UNITED STATES, *Appellee.*	

APPELLANT'S STATEMENT AND BRIEF.

The appellant who is a citizen of the United States, and a temporary resident of the District of Columbia, was on the 26th day of August, 1862, a resident of the State of New York, and, on said date, enlisted in Company I, 154 New York Volunteer Infantry, entering the service for the suppression of the late rebellion in the United States.

He served with said regiment up to the 25th day of January, 1865, when he was duly transferred to the 154th Company of the Second Battalion, Veteran Reserve Corps in which last named company he served up to April 17, 1865, when he was "honorably discharged" at camp in Nashville, Tennessee, by order of Gen. George H. Thomas "by reason of disability from *inguinal hernia* contracted from excessive labor while under military or-

ders at camp of detachment, Chattanooga, Tenn., in the summer of 1864."

May 7, 1888, upon civil service examination, he was duly appointed to a clerkship in the Post Office Department at an annual salary of $900, which position he held and efficiently filled up to February 4, 1889, when he was duly transferred to the Treasury Department and was assigned to duty in what was then known as the Sixth Auditor's Office at the same salary. He performed his duties so well in the last named service that he was, on the 31st of October, 1890, upon examination, duly promoted to a clerkship in class one in said Sixth Auditor's Office at a salary of $1200 per annum, the duties of which he faithfully performed up to March 16, 1893. On the last named date he was duly transferred to the Interior Department and assigned to duty in the Bureau of Pensions in the class in which he rendered service in the Sixth Auditor's Office immediately before his transfer last aforesaid. He discharged the duties in his new position at the salary of $1200 until March 1, 1894, when he was reduced to a clerkship of $1000 per annum, at which last named salary he continued in said service up to July 31, 1894, when he was formally discharged from the said Civil Service, since which time he has not been permitted to perform the duties of his position, although standing ready and willing at all times since the last named date to perform and fulfill his said duties.

At the time appellant was excluded from his duties as such clerk, other clerks as to whom petitioner was equally qualified for the discharge of said duties, and who were not honorably discharged from the military or naval service of the United States, were retained in the Pension Office. Neither were those other clerks, so retained, the widows or orphans of deceased soldiers or sailors.

Appellant's petition alleges that he was efficient and faithful in the discharge of his duties as such clerk, and that he possessed the necessary qualifications for said duties.

Two causes of action were embraced in his petition, namely—

1. A balance of $35.30 on the last month he was borne on the Pension Office rolls as such clerk, and

2. For his salary at the rate of $1,000 per year from the date of his, so-called, discharge from his duties of his clerkship.

To the petition in the Court below the Attorney General filed a demurrer, upon which briefs, *pro* and *con*, were filed, and oral arguments had, and an opinion of the court overruling the demurrer.

Testimony on the allegations in the petition was then taken, briefs prepared thereon and a trial had resulting in an adverse decision, by a divided court, on the case as presented.

The opinions announced by the court are found at pages 7 and 10 of the record in this court.

In the opinions of the Court it will be seen that the merits of the case were not considered by the Court ;—in short, the Court of Claims decided that the action of the Interior Department in discharging appellant as aforesaid was within the discretion of the Secretary of the Interior, and that therefore the Court of Claims could not consider the petition, and thereupon dismissed it. In short, the Court of Claims assumes that appellant is without remedy. Blackstone lays down the law, as

"A general and indisputable rule that where there is a *legal right*, there is also a legal remedy by suit, or action at law, whenever that right is invalid."

See also Marbury *vs.* Madison, 1 Cranch, 163.

The position assumed by the appellant is that the matters embraced in the said petition were not within the discretion of the Secretary of the Interior, but that he must be controlled by the Statutes of the United States in such cases made and provided.

These statutes are as follows:

Revised Statutes, section 1754:

"Persons honorably discharged from the military and naval service by reason of disability resulting from wounds or sickness incurred in the line of duty shall be preferred for appointment to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices."

Act of August 15, 1876 (Supplement Rev. Stat., Vol. 1, p. 120).

Section 3:

"That whenever, in the judgment of the head of any Department, the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class, or by a female clerk, it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service:

"*Provided*, That in making any reduction of force in any of the Executive Departments, the head of such Department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors."

The Civil Service Act of 1883 (22 Stat., L. 403, Sup. Rev. Stat., Vol. 1, p. 395).

Section 7:

"That after the expiration of six months from the passage of this Act no officer or clerk shall be appointed and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith.

"But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes of the United States, nor to take from the President any authority not inconsistent with this Act conferred by the seventeen hundred and fifty-third section of said Statutes."

Section 1753, R. S.:

"The President is authorized to perscribe such rules and regulations for admission of persons into the Civil Service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge and ability for each branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the Civil Service."

Sec. 2 of the Civil Service Act provides for "open, competitive examinations for testing the fitness of applicants for the public service."

Section 6 of said act provides for the classification of clerks in accordance with Sections 158 and 163 of the Revised Statutes of the United States.

General Rule 3 of the Civil Service Commission established and approved by the President, prescribes that,

"No person shall be appointed or employed to enter the Civil Service, classified in accordance with section 163

of the Revised Statutes, and under the act to regulate and improve the Civil Service of the United States, approved July 16, 1883, until he shall have passed an examination or shall have been shown to be especially exempted therefrom by said act, or by an exception to this rule set forth in connection with the rules regulating admission to the branch of the service he seeks to enter."

General Rule 8, Civil Service.—

1. That persons who have *prima facie* claim of preference for appointments to civil offices under Section 1754 Revised Statutes, shall be preferred in certifications made under the authority of the Commission to any appointing or nominating officer."

2. In making any reduction of force in any branch of the classified Civil Service, those persons shall be retained who, being equally qualified, have been honorably discharged from the military or naval service of the United States; and also the widows and orphans of deceased soldiers and sailors."

In the disscenting opinion of Judge Peelle of the Court of Claims bench, page 11 of the record, the position of appellant is aptly stated:

"The Claimant's right depends upon the proper construction to be given to section 3, Act of August 15, 1876, in connection with section 1754, preserved by the Civil Service Act."

And this is necessarily true in view of the rules and regulations of the Civil Service Commission, established and promulgated by the President in accordance with the Statutes above quoted.

Argument.

Appellant holds that the Court of Claims erred:

1. In not granting the Claimant's findings set out in

finding 6 of the record below, and which findings appear in this record of appeal, at pages 6 and 7, and numbered respectively, 1, 2, 3, 4, 5, 6, and 7.

2. In dismissing the petition in the lower Court, and in not giving claimant judgment on the two causes of action therein for the full amount claimed.

In short, the Court erred in not acknowledging its jurisdiction of the action, and in dismissing the petition.

The Act of March 3, 1887, section 1 (24 Stat., L. 505, 1 Sup. R. S., 559), endowed the Court of Claims with jurisdiction, as follows:

"The Court of Claims shall have jurisdiction to hear and determine the following matters: All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of any Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable."

This Act undoubtedly confers upon the Court of Claims the jurisdiction to "hear and determine" Appellant's case, because his claim is founded upon the laws of Congress, seconded by rules and regulations of the Executive Departments, authorized and promulgated by the President in accordance with express powers conferred by law on the Chief Executive of the United States.

The purpose of Congress was to secure the honorably discharged Union soldier or sailor a life tenure in the Civil Service if he possessed the necessary business quali-

fications to discharge the duties of a clerkship within the classified service.

And is this purpose not accomplished in making a law "that the head of such department *shall retain* those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States?

If the head of an Executive Department is required by said law to *retain* a clerk who has been honorably discharged from the military service of the United States if he is equally qualified with other clerks, and the head of an Executive Department fails to comply with the law relating thereto is the clerk not endowed with a remedy under the laws of the land? Or has the head of a Department a right to disregard the law? Does Executive discretion override positive *law?*

In the statute to which reference is made, there is an express command to *retain* the clerk who has once been honorably discharged from the military service of the United States. Appellant was such a clerk. "Shall retain" is a very plain and positive verb. There is no dodging it.

Let us take the language used in Section 1754, above quoted, with reference to *appointments* to the Civil Service. The section says:

"Persons honorably discharged from the military * * service by reason of disability resulting from wounds or sickness incurred in the line of duty *shall be preferred* for appointments to civil offices," etc.

Is there any question here of what the Executive officer shall do when a qualified ex-soldier asks for appointment, honorably discharged on account of any disability incurred in the line of duty?

The word *shall* means *must.*

Section 692, Revised Statutes, authorizes appeals to the Supreme Court from all final decrees of any circuit court, in language as follows:

Section 692, R. S.:

"An appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court," etc., etc. And Chief Justice Waite, in passing on this language, "Shall be allowed," in the case of *Ex-parte* Jordan, 94, U. S. 248, held that "shall be allowed" means "*must* be allowed."

On the 18th of May, 1889, the construction of the language used in said section 1754—"shall be preferred"—was considered by the Assistant Attorney-General for the Post Office Department, who gave it as his opinion that the above verb means "*must* be preferred," and is, therefore, mandatory upon the executive officer.

This opinion was called to the attention of Attorney-General Miller who in reviewing the opinion of his said Assistant, said, at page 318 of 19 Attorney-General's Opinions:

"I have no doubt that it was the intention of Congress to make it the *duty* of those making appointments for civil offices to give preferance, other things being equal, to the class of persons named in this section."

Wayne MacVeagh, Attorney-General of the United States in 1881, was called upon to construe Section 1754 R. S. and at page 195 of 17 Attorney General's Opinions, he said, in construing the same in connection with Section 1753 of the Revised Statutes, that "They do prescribe that of two or more applicants found to be equally qualified by such examination for appointment the preference *shall be given* to any such applicant who has been honorably discharged from the military or naval service

by reason of disability resulting from wounds or sickness incurred in the line of duty."

If "*shall* be preferred" means "*must* be preferred" in section 1754, "shall retain" means "*must* retain" in the Act of August 15, 1876.

If preferance of appointment "*shall be given*" to the honorably discharged Union soldier, in Section 1754, as declared by the Hon. Wayne MacVeagh, above, why is it not also clear "that in making any reduction of force in any of the Executive Departments, the head of such department *shall retain* those persons who may be equally qualified who have been honorably discharged from the military * * * service of the United States?" The answer is irresistible that the Executive head *must retain* the soldier.

In the argument in the Court below, the Attorney General intimated, if he did not assert, that the Act of August 15, 1876, gave to the Executive the right to pass judgment on the dismissal of a clerk. To reach this conclusion, he read into the *provisio* of that act, the words of the first line of the law, that "whenever in the judgment of the head of any department" he "shall retain those persons who may be equally qualified who have been honorably discharged," etc.

This was an abortive attempt upon the virtue of that act for two real good reasons,—

1. It disgraced the rules of grammar, and failed to make a complete sentence.

2. It was a desperate attempt to make the law mean what it does not, and never was intended to mean.

That act invokes the "judgment of the head of any department" upon the question of whether the duties as-

signed to clerks of a higher grade and salary may not be performed by clerks of a lower grade and salary.

And if, in his judgment, the duties so assigned can be as well performed by clerks of the lower grade and salary, then he shall discharge the higher grade clerks and keep the lower grade clerks to perform these duties; *but* and *except* the soldier or sailor, or his widow, or his orphan, these he shall not discharge.

He is expressly commanded to retain these persons. He has no discretion in the matter. He cannot form an opinion upon whether these shall be retained or dismissed. He must keep them if they have by examination proven themselves qualified for the discharge of their duties, and faithfully and efficiently perform the same.

His "judgment" is invoked only on "whether there must be a reduction of the force." The law directs and commands him to retain the soldier or sailor and his widow and his orphan, if he retains anybody.

In pursuance of this argument the next thing to consider is, as to who determines the qualifications of the appointee in the Civil Service. Does the head of an executive department decide this question?

The response to this question is, that the Civil Service Commission is especially endowed with ways and means, and is especially commissioned to determine this question; and that only the persons certified to the executive officer by said commission can be appointed to an office in the classified service. The head of a department cannot, therefore, decide upon the qualifications of appointees.

The purpose of the Civil Service law was to put the appointee beyond the personal preference or caprice of the head of an Executive Department; that a qualified appointee might be secure in his office without let or hindrance of the head of a Department.

Merit, rather than personal preference, in appointees, was the controlling spirit of the Civil Service law. The head of an Executive Department has no discretion in the matter. He must appoint whom the Civil Service Commission say is qualified. He must promote only those who upon meritorious examination show themselves entitled to promotion. The "rules and regulations" control promotions or *de*motions when the appointee has duly entered upon his duties.

The same power which created the Secretary of the Interior, March 3, 1849 (Section 437, R. S. U. S.), created the Civil Service Commission, January 16, 1883, and enacted Section 1754 R. S., March 3, 1865, and passed the Act of August 15, 1876, on 120th page of Supplement to R. S. U. S., Volume 1.

By section 441, R. S. (1878) the Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * Pensions. * *

By Section 470, R. S. U. S., (1878) there shall be in the Department of the Interior, a Commissioner of Pensions who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to receive a salary, etc., etc.

These officers cannot be greater than their creator. They are subject to the laws passed by the Congress of the United States. They are bound to obey the laws of Congress.

In the celebrated Lee case, 160 U. S. 196, at page 220, this Court held, that "no man in this country is so high that he is above the law." No officer of the law may set that law at defiance with impunity. All officers of the Government, from the highest to the lowest are creatures of the law, and are bound to obey it. It is the only supreme power in our system of Government, and every

man who, by accepting office, participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

Nearly all Civil Service laws provide for dismissals as well as appointments in express terms; for, primarily, in this country, all offices emanate from the people, and must be governed by the Constitution and the laws.

The statutes governing this case, when taken together, command three things to be done:

1. Appoint qualified persons.

2. Promote qualified persons.

3. Retain qualified persons, and, in necessary reductions of the force, retain soldiers.

The said statutes and the Civil Service rules supplementing the regulations of the Executive Departments say how the qualifications of persons for appointment, promotion, and retention shall be determined. The controlling test is *merit*. This test is not left to the Executive. It is expressly taken from him and lodged elsewhere.

The clerk's education, method, habits, deportment, etc., are all taken into consideration by the qualification department of the Government.

The Civil Service law and the rules and regulations thereunder were unquestionably designed to substitute the merit system for the personal preference of the Executive officer in all civil places within the classified service.

In the orders, instructions, etc., relating to the efficiency record and examinations for promotions in the Department of the Interior, published in January 1893, this purpose is explicitly expressed.

The President, in pursuance of this purpose, December, 4, 1891, said:

"With a view to placing promotions wholly upon the basis of *merit*, in my opinion, the examination for promotion of those who present themselves should be chiefly, if not wholly, upon their knowledge of the work of the Bureau or Department to which they belong, and the record of efficiency made by them in their previous service. I think the records of efficiency kept from day to day, should be open to the inspection of the clerks."

In accordance with the above, the Secretary of the Interior, December 31, 1892, prepared and promulgated an order, accompanied by examples and explanations which applied to the Pension Office, to secure the end desired by the President's letter.

April 23, 1894, the Hon. Hoke Smith promulgated an order concurring in the order of his predecessor and extending the same so that "promotions shall be based purely upon merit."

These "orders" were in force and effect when Appellant was summarily relieved of his duties.

The statutes above referred to provide for the admission into, and retention in the classified service, of qualified persons, and the Civil Service Act and the rules and regulations promulgated in accordance therewith prescribe by whom and in what manner these qualifications are determined. They do not depend on the personal preference and caprice of the head of a Department.

It is true that dismissals are not *expressly* provided for, but the merit system which is expressly established does include dismissals of course. The reasons set forth for appointments and promotions and the means provided for the accomplishment of appointments and promotions must inevitably include the purpose to secure the service

against inefficiency, by dropping incompetents through the same means by which appointments and promotions are secured.

The power to appoint includes the power to dismiss. The same authority to examine for appointment and promotion must be the test for dismissal, otherwise the merit system would fail; for if the Executive may dismiss at his own volition he could put out those whom he disliked as fast as the qualification department certified the appointees in, until he secured those to his liking. Radical changes in the Civil Service could thus come with each new administration, or at any time and confusion would prevail in the classified service.

Without regard to these statutes and in instances where no restrictions surrounded the Executive, he might *remove* as well as appoint at pleasure.

In the case of Hennen, *exparte*, 13 Pet., star page 256, it was held that "no tenure of office being subscribed by the Constitution or laws of the United States, it (Hennen's office) it is held at the will of the appointing power," and that Hennen was properly discharged. If, however, a tenure of office had been fixed, as is fixed by the laws referred to as applicable to this case, Hennen would not have held his office at the will of the appointing power, and could not have been summarily removed.

The Executive appoints the person who is found, by another head, to be qualified. He must retain the qualified soldier, whose qualifications are determined by the department charged with its determination.

The Executive may do three things:

1. Appoint whom the qualification department finds qualified.

2. Promote whom the qualification department finds qualified.

3. Discharge whom the qualification department finds disqualified.

He possesses no discretion.

The merit system prevails, and where the merit system prevails there can be no discretion.

The clerk under a merit system is entitled to the benefit of the laws, rules and regulations by which it is secured.

In the case of United States against Perkins, 116 U. S., 483–485, it was decided, that " when Congress by law vests the appointment of inferior officers in the heads of Departments, it may limit and restrict the power of removal as it deems best for the public interests."

This was the case of a naval cadet engineer who was not found deficient on examination ; not dismissed for misconduct under the provisions of Revised Statutes, section 1525 ; or upon and in pursuance of a sentence of court-martial ; but *was* honorably discharged *against his will.*

This Court held that he could not be thus dismissed from the service, because it was beyond the power of the Secretary of the Navy to discharge him ; that it was in violation of law. And in said suit for salary for the time dating from his so-called discharge he was authorized to recover.

It was insisted in that case that to restrict the Secretary's power, of removal infringed the Constitutional prerogative of the Executive, and was therefore void.

But it was held that Congress having the Constitutional authority to vest the appointment in the Secretary of Navy implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. This case goes further :

"The head of a Department has no Constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments but in all that is incident thereto."

The Civil Service law through which the merit system was established is held not to infringe the Constitutional prerogative of the Executive, as shown in the decision of this Court in *Ex parte* Curtis, 106 U. S., 371–379.

This legislation must be construed in *pari materia*. The key to the correct conclusion is found in keeping in mind the *object* to be accompliished by the legislation.

The ultimate object was efficient service.

The direct object,—qualified persons, with preference for honorably discharged soldiers or sailors who had incurred wounds or disease in the line of duty,—*a life tenure for these persons.*

The relation of these statutes, the one to the others, makes it reasonably clear that the "object" has been attained.

"The correct rule of interpretation is, that, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts, in *pari materia*, are to be taken together as if they were one law."

United States *vs.* Freeman, 3 How., 557;
" " *vs.* Kirby, 7 Wall., 482;
Bernier *vs.* Bernier, 147 U. S., 242.

When, therefore, an honorably discharged Union soldier proves himself qualified for a clerkship, through the established means of ascertaining this fact, and has been duly appointed to a clerkship in the classified service of the government, he "shall be retained" therein.

The soldier has a vested right in his office secured and held as appellant secured and holds his.

"The government of the United States has been emphatically termed a government of *laws*, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." Madison—Marbury case, 1 Cranch, 137, at page 163.

In the case of Lytle *vs.* Arkansas, 9 Howard, 332–333, it was declared that "where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him."

Appellant having been duly appointed to a position in the classified service, as Judge Peelle well says:

"The presumption is that he possessed the business capacity necessary for the proper discharge of the service into which he entered, and he was therefore entitled to retention in the reduction of force; but aside from such presumption, the findings set out and refused to be found because deemed irrelevant, clearly establishes the claimant's efficiency as a clerk, and that being so, he must have been 'equally qualified' as matter of fact with those so retained. Such being his status at the time of his discharge, he was entitled, under the Act of 1876, *to be retained.*"

We are dealing with a positive statute, which commands the Executive Department to retain the soldier in the service, when he has complied with other statutory requirements governing his qualifications.

We are in no way interferring with Executive discretion, or the just and necessary management of the Executive duties.

We are simply fighting for the rights conferred by the solemn laws upon the soldier who made it possible for this Government to exist.

Appellant has been deprived of his office by an arbitrary Executive officer in opposition to this positive law, which has resulted in depriving him of the salary of said office which was his vested legal right.

The Causes of Action.

1. Appellant was borne on the Pension Office Rolls up to July 31, 1894, at the annual salary of $1,000.

This entitled him to have and receive of the United States for the month of July, 1894, $84.20. He in fact only received $48.90 for his services for that month. There is therefore due him, as a balance for that month, $35.30.

He is certainly entitled to this sum, for he actually earned it.

In Sleigh's case, 9 C. Cls., 369, it was held—

"That the incumbent of an office is *prima facie* entitled to the lawful compensation thereof so long as he holds the office, though disabled by disease from performing its duties. If it be an office held at the will of the appointing power, the appointing power may remove for disability, but cannot, in the absence of express law or regulation, stop the compensation while the office continues to be held."

In the case of the United States against Williamson, 23 Wall., 411, it was decided, that the regulation of the compensation of an officer belongs to the Legislative Department.

In the case of Ware against the United States, 7 C. Cls., 565, it was held that an officer furnishing a physi-

cian's certificate of illness explaining absence from duty is entitled to his full compensation, and that no part thereof can be arbitrarily withheld from him.

Appellant's case, as to his first cause of action, is on all fours with Ware's case.

Appellant is unquestionably entitled to this $35.30 embraced in his first cause of action.

2. Having been illegally relieved of his duties as such clerk July 31, 1894, is he not legally entitled to his compensation from said last named date in the sum of $3,417, as prayed in the amended petition at page 13 of the record?

In the case of Williamson 23 Wallace, already referred to, it was held that Williamson, although at his home "awaiting orders," was entitled to the salary of the office of captain of a company of the 6th Regiment Infantry, notwithstanding he, during the time, performed no military service whatever. The fact was that he legally held the office, the pay of which he was justly entitled.

In the case of Harrold, 23 Court of Claims, 295, it was held that Harrold was justly entitled to the pay of an officer of the Army, assigned to duty which required him to be mounted, from the date of such requirement, rather than from the date when his command was actually mounted. and whether his battery was fully equipped or not.

In Sleigh's case, 9 C. Cls., 369, heretofore cited, it was decided that the incumbent of an office is *prima facie* entitled to the lawful compensation thereof so long as he holds the office."

If Appellant has been unlawfully dismissed, he is legally in office; and, *being in office*, he is *prima facie* entitled to the pay of that office. He has stood ready and

willing to discharge its duties, and has therefore done all that he could do in pursuance of his duties.

In this connection, the Court is respectfully referred to

Mecham on Public Officers;
Throop on Public Officers, Sec. 473 to 500;
Emmett *vs.* Mayor, 38 N. Y. St. R., 907;
People *vs.* Mayor, 25 Wend. (N. Y.) 680.

It is, therefore, respectfully submitted that Appellant's case is well founded in law, and that the decision of the Court of Claims be reversed, with directions to enter up a judgment in favor of Appellant in the total sum herein claimed.

JOHN C. CHANEY,
For Appellant.

No. 57.

Reply Brf. of Chaney for Appt.

OFFICE SUPREME COURT U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1899.

MORRIS KEIM
vs.
THE UNITED STATES. } No. 57.

APPELLANT'S BRIEF IN REPLY TO BRIEF OF APPELLEE.

JOHN C. CHANEY,
For Appellant.

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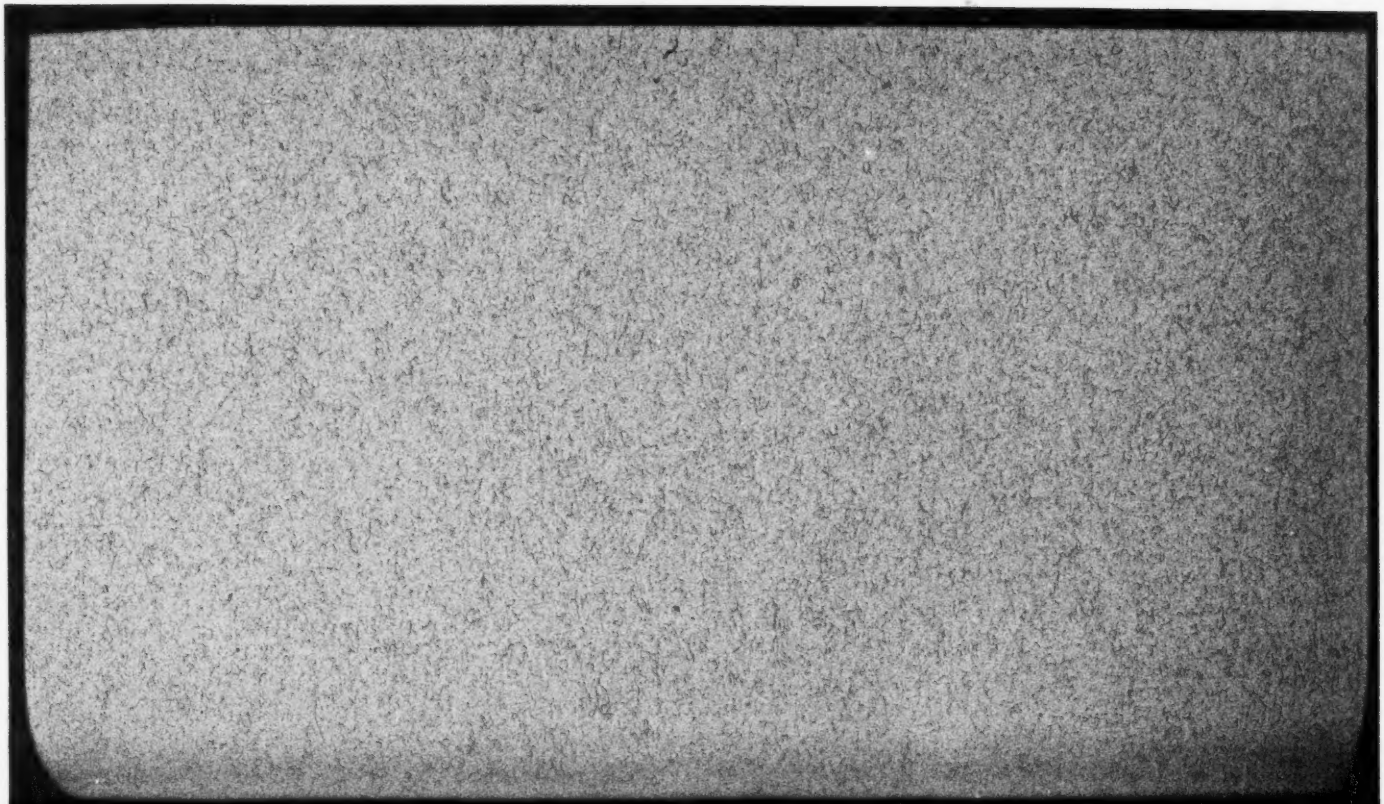

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

MORRIS KEIM,

vs.

THE UNITED STATES.

No. 57.

APPELLANT'S REPLY BRIEF.

Appellant does not seek to control executive discretion.

Congress controls executive discretion by the Civil Service law, as to everybody in the Civil Service; and as to honorably discharged soldiers and sailors, in the Civil Service, by the Act of August 15, 1876 (Supp. R. S. U. S., Vol. 1, 120).

Appellant seeks the protection of these solemn acts of the law making power.

To say that Congress cannot do this is to say that the creature is greater than his creator.

Has Congress done this? It is certain that Congress intended to do it.

When Congress said that honorably discharged soldiers and sailors must be retained in making *any* reduction of force in the Executive Departments, it said what it meant and meant what it said. The soldiers and sailors of the Union had made it possible for a Governmental Civil

Service, and it was determined that wherever they were found in the employment of the government they should have the favor of permanent positions.

The Constitution of the United States, in Article 2, provided:

"He (the President) shall, etc., but the Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments."

The Constitution first points out what positions may be filled by the President by and with the advice and consent of the Senate, but there are a great many inferior officers needed to attend to the business affairs of the United States Government and the Constitution says that Congress may vest the appointment of them in the "President alone, in the courts of law or in the heads of departments."

Congress may select either one of the three or may place the power to appoint such inferior officers in him or any one of the three mentioned and ignore the other two entirely.

For instance, the power to appoint the clerk of a United States Court has been placed, by Congress, in the judge or judges thereof. Congress may remove the power from those and place it in the President or the Attorney-General or the head of a department.

Congress where it has exercised that power of designating who shall appoint and is silent about removal, then the power of removal is incident to the power of appointment, but no one will dispute the proposition that as Congress has the power to say who shall appoint, it clearly has the power to say how that power of appointment shall be exercised.

All power in the matter is derived from the law; then, it follows, that the law must be followed in all things limiting as well as enlarging their power.

We cite the action of the last Congress as strong proof of this position. Heretofore, the grade of a post office clerk and the salary he shall receive has been subject to the discretion of the First Assistant Postmaster General.

In the re-adjustment of the salaries of the clerks in the Post-Office Department, a new condition of affairs was confronted. The bill fixed a given number of each of the various grades which cannot be increased or diminished, they are put on the same footing as letter carriers, their grade or salaries cannot be changed by the will or caprice of the head of a department. Why? Because Congress has expressed its power given to it by the Constitution to regulate such "inferior officers" by giving express directions in the matter.

In this case, the power of removal by the President or whether Congress can restrict that power does not arise. This is a case under the first clause of the Section of the Constitution referred to that relates to "inferior officers."

"We have no doubt when Congress by law vests the appointment of inferior officers in the heads of Departments that it may limit or restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to *thus vest* the appointment implies authority to *limit, restrict* and *regulate* the *removal* by such laws as Congress may enact in relation to the officers so appointed."

United States *vs.* Perkins, 116 U. S., page 483.

"The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress and by such legislation *he must be*

governed, not only in *making appointments* but in all that is *incident thereto.*" *Ibid.*

Was ever a principle stated more tersely? The head of a department is a creature of Congress—would not have a being without Congress; and can be wiped out at any time. Now is it to be said, that the creator cannot say what powers the creature has?

In the case of the suit for reinstatement of a discharged policeman, against the Board of Safety of Indianapolis, Indiana, in the Superior Court there recently, Judge Carter said:

"Whenever the holding is made to depend on anything other than the mere pleasure of the appointing power, then I think it may be said that its duration is declared by law." * * *

"While it may not be clear that the duration of the term of office is declared in the law, it is at least a matter of doubt as to whether it is not so declared, and under this view of the law, it is my duty to hold that the term of the office of policemen is declared in the charter, and that members of the police force are not subject to removal at the mere pleasure of the appointing power. * * * And I am the more inclined to such conclusion when, by so doing, I am enabled to uphold an act of the Legislature, when to hold otherwise would be to strike down one of the important reforms intended to be established by the enactment of the charter." * * *

Merit is the object sought. Appellant was appointed on his merit. As an honorably discharged soldier Congress said he posseses merit. Upon this merit Congress, by the Act of August 15, 1876, said he *shall be retained* in the Civil Service to which he was appointed.

It is not, therefore, a question of the jurisdiction of the court below to pass upon the judgment of the Secretary of the Interior as the Attorney-General insists. Congress

has said, as appellant understands it, that the Secretary of the Interior shall not pass upon the qualification of his employees, but that the Civil Service Commission shall do this.

The Civil Service Commission found appellant competent to discharge the duties of his office, and the Secretary of the Interior accepted him as a competent person.

Then, Congress said that the employee *must be retained* in his office, if he be an honorably discharged soldier or sailor, if there is work for him to do.

Under these laws, as to the right of appellant to his office, the Secretary of the Interior has no "discretion".

The Court of Claims was not, therefore, asked to pass upon the "discretion" of the Secretary.

Congress created the Secretary of the Interior and it can and does control his office by the passage of laws applicable thereto.

The Court will not be misled by this pretended "interference with executive discretion". Laws are made for the protection of the rights of the citizen, primarily. It is the duty of the executive to enforce the law,—not seek to supplant the law by "executive discretion".

Appellant has sued for his rights under laws of Congress which have received executive approval; and by solemn oaths the executive is bound to enforce, rather than evade, them.

Mr. Pendleton's remarks on the Civil Service bill, before Congress, is helpful here only to show that there was nothing in the "proposed bill" to prevent the executive making discharges at his volition, and that is true. But when Congress passed the Act of August 15, 1876, above referred to, a law was enacted, with reference to honorably discharged soldiers and sailors, which placed against the executive the prohibition which was not included in

the Civil Service Act. Appellant claims the benefit of these two Acts of Congress taken together.

He has a right to invoke these laws; and, in doing so, he does not seek to "destroy discipline," nor to interfere in any way with the just administration of the laws by which the executive is governed, but rather to support discipline in the due administration of the laws.

The Attorney-General misstates the case. Congress has declared that the Executive Departments shall not determine the qualification of their employees, and that they shall not discharge an employee who was honorably discharged from the military or naval service.

The execution of these laws is the thing for which appellant prays.

Congress has stricken out the exercise of the will and caprice of the executive officer to discharge an ex-soldier or sailor, and says that the power to discharge such persons from the Civil Service, as heretofore, is hereby abrogated from executive discretion. And, then to remove the last chance for the invocation of executive judgment the Civil Service law established a Commission to determine competency. This law is constitutional. It says that executive judgment shall be controlled in making appointments; and the Act of August 15, 1876, as to soldiers and sailors controls executive judgment as to removals.

Appellant holds that these laws govern the Secretary of the Interior; that he is without discretion in the matter.

The Hennen case, cited by appellee, cannot apply here, because that case was one in which the President was unrestricted in appointment and also unrestricted in the removal of the officer.

The Parsons case also cited by appellee was of like character.

The case of Boynton against Blaine, 139 U. S., 306, was a case where the executive discretion was sought to be controlled by the court, under the guise of the enforcement of a ministerial duty. So are also the other cases cited in appellee's brief, page 11.

As appellant is pursuing a case wherein the executive discretion has been eliminated by Congress, these cases are not helpful or applicable.

Justice Bradley, in the case of Pulaski *vs.* Lyman, cited at page 12, of appellee's brief, decided that the naked Civil Service law did not prohibit the discharge of a Civil Service employee at the discretion of the Executive. Had Pulaski been an honorably discharged soldier or sailor, and had Judge Bradley been considering the Act of August 15, 1876 in connection with the Civil Service Act, he would, probably, have rendered a different opinion.

Neither did Judge Kilpatrick have before him such a case as this when he decided Page et al. *vs.* Moffatt, 85 Fed. Rep. 38.

The statements quoted from Judge Kilpatrick's opinion, at page 12 of appellee's brief, wherein he refers to the "breaking down of all discipline in the administrative departments of the government," might be answered by saying that discipline is best preserved by the strict and honest observance of the laws which are passed for the guidance of the administrative department of the government. If the Secretary of the Interior had observed the laws under which appellant's rights are supposed to be protected he would have gone a long way toward the preservation of executive discipline.

When the law officers of the government are without law or logic they usually fall back under the petticoats of executive discretion and there seek to hide their fallacies and errors.

Executive discipline was not fractured when Congress took away from executive officers of the government the right to appoint to civil offices whom they should choose. It was then thought the free exercise of executive discretion had a tendency to rupture discipline, and damage the good of the service. This was the reason urged for the passage of the Civil Service Act.

It cannot be a very serious breach of discipline to prohibit the discharge of an honorable soldier or sailor, competent in the performance of his civil duties.

These men had preserved the union in the great life and death struggle from 1861 to 1865, and Congress having such a high appreciation of them, determined that the departmental discipline would be promoted by their permanent retention in office, and so passed the Act of August 15, 1876.

They conquered peace; they restored discipline; they are worthy of true discipline. This law took away the executive discretion and the Secretary of the Interior did an unlawful thing when he discharged appellant from his office in 1894.

Appellant does not war against executive discretion. He seeks to enforce a plain law of Congress which was enacted to secure his tenure of office.

He was competent to discharge his duties. The Civil Service Commission said so. Judge Peelle, in his dissenting opinion says so, and the majority of the court does not find differently. The endorsement on the back of the discharge "because of his rating as inefficient" was put there subsequent to his discharge, and was done solely to evade the letter of the law.

This is the suit of an honest, capable, and worthy ex-Union soldier seeking his rights under the plain laws of Congress.

The Attorney-General raises a new point, as to the meaning of a "reduction of force" in the Act of August 15, 1876. He technically urges that the force was not reduced.

On the trial of the case below, appellant sought to show that there was work in the Pension Office for him to do, believing that this was an essential fact, in order that he show an improper discharge. He also showed that others not soldiers or sailors were appointed and promoted to do his work, in order that the court might be convinced that he was really needed in the Civil Service in which he was engaged.

It is now sought to distort this into a belief that the force was not reduced, so as to avoid, if possible, even the benefit of the Act of August 15, 1876, that is to say—unless appellant has shown that there was an absolute and unqualified reduction of the force through which he lost his place, this act does him no good.

This is very unfair. "Any reduction of force" means and includes the discharge of one man, we submit.

The Attorney-General may intimate that appellant was of no account, and therefore, the force was not reduced by his discharge. But this position is not a worthy one, and will not be taken seriously.

When a single soldier falls in battle there results a "reduction of force." When a clerk is discharged from civil duty the "force" is also reduced. There may be an appointment or a promotion to the vacancy thus caused, the same day or the day after, but the fact is the force was reduced by said discharge and a filling of the vacancy proves it.

If no better objection than this can be urged to appellant's case, we shall certainly stand with confidence before the court and ask that the Court of Claims be reversed.

The question in the case is, therefore, we respectfully submit:

Whether a law of Congress which controlls executive discretion can be enforced.

Appellant has confidence in the power and disposition of the court to enforce the act of August 15, 1876 in connection with the Civil Service Act, for this court has declared the constitutionality of the Civil Service Act of 1883, in decisions so fresh that they need not be here cited.

Respectfully submitted,

JOHN C. CHANEY,
Appellant's Attorney.

WASHINGTON, D. C.
February 19, 1900.

No. 57.

Brf. of Atty. Gen. & (Boyd) for Appl.

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In the Supreme Court of the United States.

OCTOBER TERM, 1899.

MORRIS KEIM, APPELLANT,
v.
THE UNITED STATES. } No. 57.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

JAS. E. BOYD,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

MORRIS KEIM, APPELLANT,
v.
THE UNITED STATES. } No. 57.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

Morris Keim, the appellant, commenced this action in the Court of Claims by a petition on the 25th of July, 1895. He filed amended petitions by leave of court on the 7th of October, 1895, on the 22d of December, 1895, and on the 8th of January, 1898. The second and third amended petitions are set forth in the record, one on pages 1, 2, and 3, and the other on pages 13, 14, and 15. His last demand for judgment was for $3,452.30.

The facts set out in the several petitions are substantially the same: That Keim, who is a citizen of the

United States and of the State of Virginia, was duly certified after an examination by the Civil Service Commission and was, on the 7th of May, 1888, appointed to a clerkship in the Post-Office Department of the United States at a salary of $900 per annum. He was thereafter, upon his own request, transferred from the Post-Office Department to the Treasury Department, and, later on, from the Treasury Department to the Interior Department, in which last-named Department he was at first appointed to a clerkship at a salary of $1,200 a year, and assigned to duty in the Pension Bureau. Subsequently his salary was reduced to $1,000 per annum and he was holding a clerkship in the Interior Department, and was on duty in the Pension Bureau, at $1,000 a year on the 31st of July, 1894, when he was discharged from the service by order of the Secretary of the Interior. The action of the Secretary appears to have been based upon the following indorsement on the order of discharge (record, p. 5):

> The discharge of Mr. Morris Keim was recommended because of his rating as inefficient. No other charges are made against him.
>
> WM. LOCHREN,
> *Commissioner.*
>
> JULY 14, 1894.

Keim was a soldier in the Army of the United States during the civil war and was honorably discharged therefrom April 17, 1865.

It is further found as a fact that at the time of Keim's discharge from the clerkship, the Secretary of the Interior, upon the recommendation of the Commissioner of

Pensions, retained, and continued to retain at the time of the trial of this case in the court below, other clerks of the same division, who received after Keim's discharge, and continued to receive, a salary of $1,000 per annum, and that said clerks were persons who had not served in the military or naval service of the United States and had, therefore, not been honorably discharged therefrom. The court further states in substance that the clerks retained are not shown to the court, except as set forth in the findings, to have possessed at the time of Keim's discharge better or inferior capacity for the proper discharge of the duties of their said offices than were the qualifications of Keim for the discharge of the duties at that time; and further, that on or about the day that Keim received notice of his discharge additional clerks were appointed to duties in the same division in which he served in the said Bureau who had never rendered any military or naval service. It did not appear, says the court, that any of these clerks were regarded or reported as inefficient by any superior officer, and it does not appear that those so retained, or those thereafter appointed, possessed better, or equal, or inferior qualifications for the discharge of the duties of their respective offices than those possessed therefor by Keim (findings of fact by the court, Record, pp. 4 and 5). The amount demanded by Keim, to wit, the sum of $3,452.30, is the salary which he would have received if he had remained in the service from the time of his dismissal to the filing of his last amended petition. He alleges in his petition that he was at all times ready and willing

to perform the duties of the clerkship from which he had been dismissed and was prevented from so doing by the action of the Secretary of the Interior, in discharging him from the service. The court in its finding of facts (Record, p. 5) says that there is no evidence that Keim made any effort to secure other employment or that he has, or has not, been employed at any other kind of work from and after his discharge. Keim requested additional findings of fact, which the court refused (Record, pp. 6 and 7). The court, in an opinion which will be found in the record (pp. 7, 8, 9, and 10), dismissed the petition and Keim appealed.

ARGUMENT.

The principal question involved in this case is as to whether the courts have the right to review the action of the head of an Executive Department in discharging a clerk from such Department.

Keim, who was appointed under the civil-service régime to the position which he held, now insists that, by virtue of section 1754, Revised Statutes, and other provisions of law, cited in his brief and hereafter referred to, his discharge from the service was illegal, and that the courts have the right to review the action of the Secretary of the Interior in discharging him.

So far as section 1754 is concerned, I can not see that it has any bearing upon this case. That section is as follows:

> Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty,

> shall be preferred for appointment to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices.

As will be seen, it relates altogether to appointments to civil offices and makes no reference whatever to discharges.

Keim is an honorably discharged soldier, and if his discharge from the Army was by reason of disability resulting from wounds or sickness incurred in the line of duty, under section 1754 he would have the preference in appointment to civil office, provided he possessed qualifications equal to those of others seeking the same position, and having been appointed to a position in the civil service of the Government it is to be presumed that he had the benefit of all the legal rights and preferences to which he was entitled by the foregoing statute or any other.

But, as before suggested, the question of appointment is not for consideration in this case. There is no complaint as to the manner of appointment or as to the position to which Keim was assigned. The question in this case is solely as to whether, after Keim had been appointed to a clerkship in the Interior Department, the Secretary of the Interior had the power to remove him, and if, after the Secretary had exercised such power, the courts have a right to inquire into and pass upon the validity of his action.

In the brief filed by appellant it is claimed that there is another statute which protected him, namely, section 3

of the act of August 15, 1876 (Supp. R. S., Vol. I, 120), which reads as follows:

> That whenever, in the judgment of the head of any department, the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class or by a female clerk, it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service:
>
> *Provided*, That in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States and the widows and orphans of deceased soldiers and sailors. * * *

It is the proviso in this section upon which appellant relies. He insists that, because he has been honorably discharged from the military service of the United States, in making any reduction of the force in the Interior Department, in which he was a clerk, the head of the Department should have retained him in preference to those who had not been in the military or naval service of the United States.

Unfortunately for appellant, this statute has no application, for the reason that, upon the facts as they appear, his discharge was not the result of a reduction of force in the Interior Department, but he was dismissed from the service upon the ground that his rating was inefficient. In other words, when the record he had made was examined and his punctuality, attendance, industry, conduct, and ability were passed upon it was found that

his rating as a clerk in the Department was inefficient, and he was thereupon discharged from the service.

Appellant then claims protection under the civil-service act of 1883 (22 Stats., 403, Supp. R. S., Vol. I, 395, section 7):

> That after the expiration of six months from the passage of this act no officer or clerk shall be appointed and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith.
>
> But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes of the United States, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said Statutes.

But it will be observed that the second paragraph of that section simply preserves the preference in appointment to which persons discharged from the military and naval service were entitled under section 1754, Revised Statutes, before referred to.

We find ourselves, therefore, coming back to the single proposition, which is, Has the Court of Claims jurisdiction to review the order of the head of an Executive Department of the Government in discharging a clerk whose rating is found to be inefficient? In other words, has the Court of Claims or any other court the power to institute an inquiry as to whether the judgment of the

head of an Executive Department, in passing upon the competency of a clerk, is founded upon sufficient reasons, and if not so founded in the opinion of the court, then to reverse such judgment and order the clerk to be reinstated, or, as is demanded in this case, to compel the Government to pay the salary, although no duties have been performed by the claimant?

The power of appointment to positions like the one held by appellant being vested by law in the head of the executive department in which he was serving, the right of removal necessarily follows (*Ex parte Hennen*, 13 Pet., 230; *Parson* v. *United States*, 167 U. S., 324), and the retention or removal of a person from such a position is vested entirely in the judgment and discretion of the head of the department, and this judgment and discretion, when exercised, can not be reviewed by the courts. To hold otherwise would simply lead to interminable confusion, would destroy discipline in the subordinate service in the executive departments, and would take away the power of the head of the department, who is responsible for its work, to pass upon the competency of those upon whom he must rely for the orderly and efficient conduct of its business. If a court has the power to institute an investigation to test the qualifications of a clerk who has been dismissed from an Executive Department, it would follow that the same court should inquire into the qualifications of the clerks who are retained or who have been appointed to fill vacancies. This would be necessary in order that the court might determine relative merit, for it will not do to say that the dismissed clerk possessed equal qualifications with

the clerk retained or appointed, unless the qualifications of the latter are ascertained by the same tribunal which passes upon the efficiency of the dismissed clerk. No intelligent or just decision could be arrived at upon such a question until the court was in possession of facts relating to both those dismissed and those retained or appointed. We can readily see what such a power vested in the courts would lead to. Every reduction or dismissal of a clerk in an Executive Department would be subject to judicial supervision, with the power on the part of the courts to reverse the action of the head of an Executive Department and to promote or reinstate clerks in such Departments without regard to judgment of the head of the Department.

The cases given above in support of the position that the power of removal is necessarily incident to the power of appointment are those cited by the Court of Claims in the opinion in this case, which will be found in the record, pages 7, 8, 9, and 10. There are numerous decisions and authorities touching upon the question of the right of the courts to interfere with an executive officer in the exercise of his discretion and judgment in making removals from office. When the civil-service act was under discussion in the Senate of the United States, Mr. Pendleton, who introduced it, said (Congressional Record, vol. 13, p. 81):

> The framers of the bill provoke no conflict with the constitutional power of removal from office. They avoid the delicate and difficult question of the duration of official terms. * * * They wisely thought that if every future vacancy should be filled

> by the appointment of the one man, in fact, the best fitted to discharge the duties, all other questions would soon settle themselves; that if no amount of pressure or patronage, however great, could avail to put a favorite into a vacancy, little wrongful pressure or patronage would be used to make a vacancy.

Again, he says, page 82, in the same volume of the Record:

> I have sufficiently indicated the constitutional difficulty which may arise and the wisdom of avoiding it. * * * Removals are rarely asked for under the spoils system except to make a vacancy for a particular man. If another man is to be put in, especially if the other man be the favorite of nobody, be recommended by nobody, be the partisan servitor of no person and no party, if he be simply the most capable and fit man for the place, demands for removal will be made only for cause, and then the demand should be heeded. Under the merit system of appointment the question of removal will be solved without legislation.

And again, on the same page, Mr. Pendleton says:

> Many very ardent friends of civil-service reform are opposed to what they call the establishment of an official class among the people. They advocate a fixed term for all officers. * * * For the present, without expressing any opinion or committing its supporters in any degree, this bill leaves the subject untouched.

And Mr. Justice Bradley, of the supreme court of the District of Columbia, in the case of *Gaddis* v. *Carlisle*, follows in the same line and says:

> Although, apparently, it has become a difficult thing to get into the civil service, yet it is just as

easy to get out as it was before the enactment of the law.

And further on he says:

> Whatever may be my opinion as to the competency of the relator to fill the position that he occupied, or my opinion as to the insufficiency and inadequacy and impropriety and lack of public policy of the reasons that were given for his removal, it is perfectly clear to me that this court is without authority to interfere in this case. (Congressional Record, vol. 26, p. 6224.)

The Secretary of the Interior in discharging the appellant on the ground that his rating was inefficient, was exercising a judgment and discretion vested in him over which the courts have no control and no authority to review.

In the case of the *United States ex rel. Boynton* v. *Blaine* (139 U. S., 306–326), Mr. Chief Justice Fuller, delivering the opinion of the court, says:

> The writ of mandamus can not issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion.

See also—

United States v. *Windom*, 137 U. S., 636.
United States v. *Seaman*, 17 How., 225.
Woods v. *Gary*, 25 Washington Law Rep., 591.
Carr v. *Gordon*, 82 Fed. Rep., 373.
Couper v. *Smyth*, 84 Fed. Rep., 757.
Morgan v. *Nunn*, 84 Fed. Rep., 551.
Flemming v. *Stahl*, 83 Fed. Rep., 940.
Dudley v. *James*, 83 Fed. Rep., 345.

"Congress has left in the heads of departments all the discretionary power that was vested in them prior to the passage of the civil-service law and the promulgation of the rules relative to removals." (*Pulaski* v. *Lyman*, 21 Washington Law Rep., 403.)

In the case of *Page et al.* v. *Moffett* (85 Fed. Rep., 38), Kirkpatrick, district judge, says:

> The power of removal, which, by the act vested in the appointing power, subject though it be to certain limitations, can not be reviewed by an appeal to the courts. The result would be a breaking down of all discipline in every administrative department of the Government.

I could cite many other authorities, all to the same effect, but reference to most of them will be found in some one of the cases to which I have called the court's attention. I desire, however, to direct the court particularly to the opinion of the Court of Claims dismissing the petition in this case, for it is a learned and impressive presentation of the questions involved.

In conclusion, therefore, my contention is that the action taken in discharging the appellant as a clerk in the Interior Department was not a ministerial act, but was the exercise of a power vested by law in the judgment and discretion of the Secretary, and when the action was taken it was final, and the courts have no right to interfere.

JAS. E. BOYD,
Assistant Attorney-General.

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KEIM *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 57. Submitted March 5, 1900. — Decided April 9, 1900.

Keim was honorably discharged from the military service by reason of disability resulting from injuries received in it. He passed the civil service examination, and, after service in the Post Office Department, was transferred to the Department of the Interior at his own request. Soon after he was discharged because his rating was inefficient. No other charge was made against him. *Held* that the courts of the United States could not supervise the action of the head of the Department of the Interior in discharging him.

THIS case comes on appeal from a decree of the Court of Claims dismissing appellant's petition. 33 C. Cl. 174. The findings of that court show that petitioner was on April 17, 1865, honorably discharged from the military service of the United States by reason of disability resulting from injuries received in such service. He passed the civil service examination, and on May 7, 1888, was appointed to a clerkship in the Post Office Department. On March 16, 1893, at his own request and on the certificate of the Civil Service Commission, he was trans-

ferred to the Department of the Interior, and assigned to a clerkship in class 1 in the Pension Bureau, with a salary of $1200 per year. On March 1, 1894, his salary was reduced to $1000 per annum, at which salary he continued to serve to July 31, 1894, when he was discharged, and has not since been permitted to perform the duties of his clerkship, although ready and willing to do so. The discharge by the Secretary of the Interior was made upon this recommendation from the Commissioner of Pensions: "The discharge of Mr. Morris Keim was recommended because of his rating as inefficient. No other charges are made against him. William Lochren, Commissioner." The fourth and sixth findings are as follows:

"IV. At the time of his said discharge the requirements of the public service in said Pension Bureau demanded the retention of a clerk in plaintiff's place; the Secretary of the Interior, upon the recommendation of the Commissioner of Pensions, retained at the time of plaintiff's discharge, and now retains, other clerks of the same division who have received since plaintiff's discharge, and are now receiving, the same salary, to wit, $1000 per annum (one receiving $1200 per annum), who have not been honorably discharged from the military or naval service of the United States, and who are not shown to this court, except as in these findings set forth, to have possessed at the time of plaintiff's discharge better or inferior business capacity for the proper discharge of the duties of their said offices than the qualifications for the said duties possessed by plaintiff at that time. On or about the day plaintiff received notice of his discharge additional clerks were appointed to duties in the same division in which he served in said bureau who never rendered any military or naval service. It does not appear that any of these clerks were regarded or reported as inefficient by any superior officer; nor does it appear that those so retained or those thereafter appointed possessed better, or equal, or inferior qualifications for the discharge of the duties of their respective offices than those possessed therefor by the plaintiff."

"VI. There is no evidence that the plaintiff made any effort to secure other employment, or that he has, or has not, been employed at any kind of work from and after his said discharge

July, 1894. Nor is there evidence as to the difference in amount between his salary while in the government service and any moneys he might have earned or could have reasonably earned or has earned in other ways since his said discharge."

The petitioner requested additional findings, of which the only portions material to this inquiry are in the latter part of finding 3, that "he was formally discharged from said service, without any fault of his own, and without just cause, and has not since said last named date been permitted to discharge the duties of said clerkship, although he has at all times, since said last-named date, stood ready and willing to discharge the duties thereof." And finding 5: "That petitioner was at the time of his so-called discharge an efficient clerk, and discharged his duties faithfully and efficiently, and at the time of his said discharge he possessed and now possesses the necessary business capacity for the proper discharge of the duties of said clerkship."

These findings the court declined to make, "deeming said requested findings, if true, to be irrelevant to the issue presented."

Mr. John C. Chaney for appellant.

Mr. Assistant Attorney General Boyd for the United States.

Mr. Justice Brewer, after stating the facts, delivered the opinion of the court.

Upon these facts we are asked to decide whether the courts may supervise the action of the head of a department in discharging one of the clerks therein.

It has been repeatedly adjudged that the courts have no general supervising power over the proceedings and action of the various administrative departments of government. Thus, in *Decatur* v. *Paulding*, 14 Pet. 497, 515, in which was presented the question of the right of the Circuit Court of the District of Columbia to issue a writ of mandamus to the Secretary of the Navy to perform an executive act not merely ministerial but

involving the exercise of judgment, it was said by Chief Justice Taney:

"The court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer and guide and control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties. . . . The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them."

The same proposition was reaffirmed in *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, in an elaborate opinion by Mr. Justice Bradley. See also *United States ex rel. Redfield* v. *Windom*, 137 U. S. 636; *Boynton* v. *Blaine*, 139 U. S. 306. In *United States* v. *Schurz*, 102 U. S. 378, 396, it was said by Mr. Justice Miller:

"Congress has also enacted a system of laws by which rights to these lands may be acquired and the title of the Government conveyed to the citizen. This court has with a strong hand upheld the doctrine that, so long as the legal title to these lands remained in the United States and the proceedings for acquiring it were as yet *in fieri*, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere."

The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefore it is one of those acts over which the courts have no general supervising power.

In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment. "It cannot for a moment be admitted that it was the intention of the Constitution that those offices which are denominated

inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment." *In re Hennen*, 13 Pet. 230, 259; *Parsons* v. *United States*, 167 U. S. 324. Unless, therefore, there be some specific provision to the contrary, the action of the Secretary of the Interior in removing the petitioner from office on account of inefficiency is beyond review in the courts either by mandamus to reinstate him or by compelling payment of salary as though he had not been removed.

The Revised Statutes, sec. 1754, provide:

"Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty shall be preferred for appointments to civil offices, provided they are found to possess the business capacity necessary for the proper discharge of the duties of such offices."

But this does not avail the petitioner. He was preferred for appointment and held under that appointment for years. There was no disregard of that section either in letter or spirit; no evasion of its obligations. He was not appointed on one day and discharged on the next, but after his first appointment continued in service until it was found that he was inefficient.

Section 3 of the act of August 15, 1876, 19 Stat. 169, is:

"That whenever, in the judgment of the head of any department, the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class, or by a female clerk, it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of the clerks of the lower grade within the limit of the total appropriation for such clerical service: *Provided*, That in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors."

In section 7 of the Civil Service act of 1883 (22 Stat. 406) is this proviso:

"But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes."

But these sections do not contemplate the retention in office of a clerk who is inefficient, nor attempt to transfer the power of determining the question of efficiency from the heads of departments to the courts. The proviso in section 3 of the act of August 15, 1876, expressly limits the preference to those "equally qualified."

No thoughtful person questions the obligations which the nation is under to those who have done faithful service in its army or navy. Congress has generously provided for the discharge of those obligations in a system of pensions more munificent than has ever before been known in the history of the world. But it would be an insult to the intelligence of Congress to suppose that it contemplated any degradation of the civil service by the appointment to or continuance in office of incompetent or inefficient clerks simply because they had been honorably discharged from the military or naval service. The preference, and it is only a preference, is to be exercised as between those "equally qualified," and this petitioner was discharged because of inefficiency. That, it may be said, does not imply misconduct but simply neglect, but a neglected duty often works as much against the interests of the Government as a duty wrongfully performed, and the Government has a right to demand and expect of its employés not merely competency, but fidelity and attention to the duties of their positions.

Nowhere in these statutory provisions is there anything to indicate that the duty of passing, in the first instance, upon the qualifications of the applicants, or, later, upon the competency or efficiency of those who have been tested in the service, was taken away from the administrative officers and transferred to the courts. Indeed, it may well be doubted whether that is a

duty which is strictly judicial in its nature. It would seem strange that one having passed a civil service examination could challenge the rating made by the commission, and ask the courts to review such rating, thus transferring from the commission, charged with the duty of examination, to the courts a function which is, at least, more administrative than judicial; and if courts should not be called upon to supervise the results of a civil service examination equally inappropriate would be an investigation into the actual work done by the various clerks, a comparison of one with another as to competency, attention to duty, etc. These are matters peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.

We see no error in the conclusions of the Court of Claims, and its decree is

Affirmed.